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**PRE-TRIAL CHAMBER II**

**Before: Judge Antoine Kesia-Mbe Mindua, Presiding Judge  
Judge Tomoko Akane  
Judge Rosario Salvatore Aitala**

**SITUATION IN UGANDA**

**Public**

**OPCV's Observations on the Notification by the Board of Directors in accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake further activities in Uganda**

**Source: Office of Public Counsel for Victims**

**Document to be notified in accordance with regulation 31 of the *Regulations of the******Court to:*****The Office of the Prosecutor**

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## I. INTRODUCTION

1. Pursuant to Pre-Trial Chamber II's Decision requesting observations,<sup>1</sup> the Principal Counsel of the Office of Public Counsel for Victims (the "OPCV" or the "Office"), in her capacity as Common Legal Representative of victims in the *Ongwen* case and counsel representing victims in the Situation in Uganda,<sup>2</sup> and Counsel of the OPCV representing victims in the *Kony et al.* case<sup>3</sup> (jointly "Counsel") respectfully submit their joint observations on the Trust Fund for Victims' Notification dated 19 December 2018 (the "Notification").<sup>4</sup>

2. Counsel submit that the activities proposed in the Notification do not appear to pre-determine any issue to be ruled by the Court, nor do they appear to violate the presumption of innocence or to be prejudicial to or inconsistent with the rights of accused and suspects and a fair and impartial trial. Counsel consequently submit that the Chamber should approve the proposed projects without delay to permit their prompt implementation by the Trust Fund for Victims (the "TFV"). Furthermore, Counsel commend the TFV's efforts and willingness to continue providing assistance to as many victims as possible in the Situation in Uganda.

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<sup>1</sup> See the "Decision requesting observations" (Pre-Trial Chamber II), [No. ICC-02/04-230](#), 24 December 2018.

<sup>2</sup> See the "Decision on legal representation of Victims a/0065/06, a/0066/06, a/0068/06, a/0088/06, a/0090/06 to a/0096/06, a/0098/06, a/0102/06, a/0103/06, a/0112/06, a/0115/06, a/0117/06, a/0118/06, a/0120/06 to a/0126/06, a/0076/07 to a/0078/07, a/0081/07, a/0082/07, a/0084/07, a/0085/07, a/0090/07 to a/0103/07, a/105/07 to a/0108/07, a/0112/07, a/0115/07, a/0117/07, a/0118/07 and a/0123/07" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-176](#), 09 February 2009, paras. 9-14 and p. 8. See also the "Decision on Victim's Participation in Proceedings Related to the Situation in Uganda" (Pre-Trial Chamber II, Single Judge), [No. ICC-02/04-191](#), 12 March 2012, p. 20.

<sup>3</sup> *Idem.*

<sup>4</sup> See the "Notification by the Board of Directors in accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake further activities in Uganda" and its Confidential Annex I, [No. ICC-02/04-229](#) and [No. ICC-02/04-229-Conf-AnxI](#), 19 December 2018 (the "Notification").

## II. PROCEDURAL HISTORY

3. Respectively on 23 October, 29 and 30 November 2018, the nine assistance projects by the TFV providing support to victims in Northern Uganda ceased to be implemented.<sup>5</sup>

4. On 19 December 2018, the Board of Directors of the TFV submitted the Notification in accordance with Regulation 50(a) of the Regulations of the Trust Fund of its conclusion to undertake further activities in Uganda.<sup>6</sup>

5. On 24 December 2018, Pre-Trial Chamber II issued a Decision inviting the Office of Public Counsel for the Defence, the Defence for Mr Ongwen, the OPCV, the Legal Representatives in the *Ongwen* case and the Prosecution to submit their observations on the Notification by 25 January 2019.<sup>7</sup>

6. On 17 January 2019, the Prosecution filed its Observations on the Notification, supporting the undertaking of the six assistance projects identified by the TFV.<sup>8</sup>

## III. SUBMISSIONS

### **1. Assessment of the criteria under Regulation 50 of the Regulations of the Trust Fund for the implementation of the specified activities**

7. Preliminarily, Counsel refer to the jurisprudence of the Pre-Trial Chambers of the Court according to which, *“in addition to the mandate provided for in article 79(2) of the Rome Statute and rule 98 (1) to (4) of the Rules of Procedure and Evidence, related to resources pursuant to orders of the Court, the TFV has a further mandate under rule 98(5) of*

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<sup>5</sup> *Idem*, para. 6.

<sup>6</sup> *Ibid.*

<sup>7</sup> See the “Decision requesting observations”, *supra* note 1.

<sup>8</sup> See the “Prosecution’s Observations on the “Notification of the Board of Directors in accordance with Regulation 50(a) of the Regulations of the Trust Fund for Victims of its conclusion to undertake further activities in Uganda”, [No. ICC-02/04-232](#), 17 January 2019.

*the Rules and chapter II of the Regulations of the Trust Fund for Victims (the "TFV Regulations"), related to other resources to be used for the benefit of victims".*<sup>9</sup> In this regard, Counsel underline the responsibility of the TFV to ensure that sufficient funds are available in the eventuality of a reparation order pursuant to article 75 of the Rome Statute, as highlighted by Pre-Trial Chamber I.<sup>10</sup>

8. Counsel further recall that the power of the Chamber to scrutinize activities and projects of the TFV related to its assistance mandate (chapter II) is governed by the criteria laid down in regulation 50(a)(ii) of the Regulations of the Trust Fund. Counsel submit that the TFV enjoys discretion to interpret its Regulations applying the principle of good faith taking into account the object and purpose of said Regulations as commanded by article 31(1) of the Vienna Convention on the Law of Treaties.<sup>11</sup> However, said interpretation is subject to judicial scrutiny as far as the appreciation of the implementation of the good faith principle is concerned. Accordingly, the power of the Chamber under regulation 50(a)(i) of the Regulations of the Trust Fund is limited to this evaluation and thus activities and projects under chapter II of said provisions should not be implemented prior to a tacit or explicit determination by the Chamber in this regard.<sup>12</sup> Counsel thus contend that the scrutiny of the Chamber is limited to verifying whether the Trust Fund abused its discretion in interpreting the relevant provisions. Indeed, while this assessment remains in the judicial domain, the expertise of the Trust Fund rests in the area of humanitarian assistance and development which is crucial for its role, especially

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<sup>9</sup> See the "Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification" (Pre-Trial Chamber II), [No. ICC-02/04-126](#), 19 March 2008, pp. 3-4. See also the "Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund" (Pre-Trial Chamber I), [No. ICC-01/04-492](#), 11 April 2008, p. 7.

<sup>10</sup> See the "Decision on the Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund", *idem*, p. 7.

<sup>11</sup> See Article 31(1) of the Vienna Convention on the Law of Treaties: "*A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.*"

<sup>12</sup> See the "Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification", *supra* note 9, p. 4.

when it comes to defining its own methodology for assessing needs in the field; the adequacy of the suggested projects; as well as the type of assistance to be provided.

9. Counsel observe that the six projects proposed by the Trust Fund in the Annex to the Notification<sup>13</sup> aim at providing physical and psychological rehabilitation to victims and their families having suffered harm as a result of the commission of any crime within the jurisdiction of the Court, as foreseen by regulation 50(a)(i), hence falling within the ambit of chapter II of the Regulations of the Trust Fund.<sup>14</sup> Some projects seem to include both aspects while others focus on a particular category.

10. In line with the Court's jurisprudence, Counsel further submit that the proposed activities are defined in general and non-discriminatory terms. Indeed, the proposed activities and projects are all undertaken on the territory of, and in relation to, a situation for which the Court has initiated an investigation (the Situation in Uganda) and the TFV is thus acting in conformity with the letter and the spirit of regulation 48 of its Regulations.

11. Counsel also submit that the proposed activities and projects are defined without reference to any identified alleged perpetrator, specific crime or location, or individually identified victim. In this regard, Counsel submit that the specified activities, as contained in the Annex to the Notification, do not pre-determine any other issue on which the Pre-Trial Chamber could rule in the context of the Situation in Uganda or of the pre-trial stage of the *Kony and al.* case, in as much as the proposed activities appear unrelated to national proceedings or to the proceedings concerning the investigation in the Situation in Uganda, or to any case arising out of such investigation.

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<sup>13</sup> See the Confidential Annex I to the Notification, *supra* note 4.

<sup>14</sup> See the "Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification", *supra* note 12.

12. As a consequence, Counsel submit that the proposed projects appear to be compatible with the criteria laid down in regulation 50(a)(ii) of the Regulations of the Trust Fund.<sup>15</sup> In light of these criteria, Counsel posit that the information available to the Chamber is sufficient to make a determination on the proposed activities and approve them. However, for the benefit of the future beneficiaries of said projects, Counsel wish to address additional comments for the TFV's consideration.

## **2. Additional comments for the consideration of the TFV**

13. While submitting that the Chamber is in a position to swiftly approve the projects proposed by the TFV for their implementation as soon as practicable, Counsel wish to draw the attention of the Trust Fund on some specific aspects of the foreseen projects.

14. Counsel warmly welcome the decision of the Board of Directors to continue the assistance program in Northern Uganda. Indeed, it appears that a vast majority of the needs identified in 2008 still exist today. Moreover, new critical issues have arisen since then and said issues could be usefully addressed by the TFV at this juncture.

15. In this regard, Counsel note that each of the six projects mentioned in the Annex to the Notification covers almost all of the districts located in the Northern part of the country (22 over 30 existing districts, as opposed to 7 identified in 2008).<sup>16</sup> Counsel submit that this new approach is particularly appropriate since the victims who will benefit from said projects are indeed residing throughout the northern territory. Furthermore, Counsel view this approach as a renewed understanding by

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<sup>15</sup> *Idem*, the "Decision on Notification of the Trust Fund for Victims and on its Request for Leave to respond to OPCD's Observations on the Notification", p. 5.

<sup>16</sup> See the "Notification of the Board of Directors of the Trust Fund for Victims in accordance with Regulation 50 of the Regulations of the Trust Fund for Victims with Confidential Annex", [No. ICC-02/04-114](#) and [No. ICC-02/04-114-Conf-Anx](#), 28 January 2008 (the "2008 Notification").

the TFV of the realities of the victims who neither have the financial means nor the possibility (either logistically or physically) to travel long distances in order to access and benefit from the assistance projects. Counsel consequently express their appreciation of the TFV's approach and expect that the projects will be implemented as geographically close as possible to the affected victims and communities.

16. Counsel further take note of the TFV's observation in relation to the small number of organisations having submitted their expressions of interest as a result of the EOI launched on 8 February 2018.<sup>17</sup> Counsel underline that the criteria used by the TFV, while being necessary to attract experienced organisations in the field, seem to disqualify local organisations. In such circumstances, Counsel posit that developing local capacities in order to ensure the projects' perennality and their appropriations by victims communities – in turn leading to their empowerment – is essential.

17. In addition, Counsel note that with the lapse of time, some victims saw their situation deteriorating. Indeed, inevitably, the needs of the victims whose harms (physical injuries, psychological distresses and/or economic harm) were not addressed by the projects set up in 2008, could only worsen. In addition, due to the transgenerational impacts of many of the harms suffered, many more victims are in need for support compared to the situation prevailing in 2008.<sup>18</sup> Empowering

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<sup>17</sup> See the Notification, *supra* note 4, para. 8.

<sup>18</sup> Counsel involved in the *Ongwen* case wishes, in particular, to underline the relevant information about the interplay between the Acholi culture and the impacts of trauma made available in said proceedings. See the Report of Prof. Seggane Musisi dated 10 March 2018, "Expert Report on the Interplay of Acholi Culture with the Traumas meted out to the Acholi People of Uganda by the Lord's Resistance Army, LRA: the crimes, the harms suffered by the victims and the impacts of the crimes on the victims", UGA-PCV-0003-0046 (public evidence), p. 31 of the report: "*Acholiland was not prepared for the children of trauma: born of rape, incest, orphaned or abandoned children whose parents could not be traced. Some were left in the bush after their parents were killed or ran away to grow up as feral children. There were many war orphans and some were the result of the death of their parents from HIV/AIDS. Sibling headed households came on the scene living as Children On Their Own (COTOs). Many children were seen in IDP camps wandering about without carers. After the camps were disbanded many of such children went to live in towns as drug-addicted street children, begging and stealing for survival. Many girls became sex workers for survival. All these children became urban lumpen popularly called bayaye. Acholi traditions [sic] and customs were not prepared for them. NGOs and faith based organizations have attempted to help e.g. GUSCO, Friends of*

communities who are in urgent need of assistance is therefore of the utmost importance in order to ensure the sustainability of the TFV's assistance program and its impacts.<sup>19</sup> Alleviating the harm suffered by victims and their families and strengthening their community based services would in turn generate further resilience amongst the affected communities and facilitate a long-term improvement of victims' daily lives. Such an approach would create an appropriate basis for essential services that could be developed in the future, and avoid the misfortune of the communities having to start from scratch again every 10 years.

18. In this regard, while saluting the willingness of the TFV to continue with its assistance program in Northern Uganda,<sup>20</sup> Counsel underline the necessity to first and foremost assimilate the lessons learned from the activities conducted over the last 10 years and ensure the appropriateness and responsiveness of the newly selected projects. Yet, the Notification of the TFV does not discuss such a crucial and central aspect thereof.<sup>21</sup> However, in light of the processes described by the TFV in the Notification and observing that the Board of Directors – fully informed and knowledgeable of said processes and associated timelines – only issued its decision in May 2017, Counsel assume that such an assessment and lessons-learned exercise

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*Orphans (FRO), TIPO, UNESCO, World Vision, PCAF, etc. However, without a concerted government policy for the care of Orphans and Vulnerable Children affected by war(s) a whole generation of Acholi children will potentially be lost. This has the potential to create transgenerational cross-over problems and future conflict"* (footnotes omitted). See also the transcript of the hearing held on 23 May 2018, corresponding to the questioning of said Expert (UGA-PCV-0003), [No. ICC-02/04-01/15-T-177-ENG ET WT](#), pp. 29 to 31 and specifically page 31, lines 8 to 16: *"I was out of Uganda for some 20 years and I saw many Acholi educated, doctors, lawyers, engineers, who had left and gone abroad never to come back. The loss of social capital, the loss of roads, of schools, all of this translates in massive poverty, marginalisation, hopelessness in a people which may take years to correct. The performance indices of Acholi children now, I don't mean Acholi tribe, unless in Kampala, okay, but I mean as a region on the national exams is the lowest in the country, you know. The poverty levels are very high. HIV rates have gone up. These things affect a community, they marginalise it. These trans-- and it will go to the next generation, it will take a long time to correct"* and pp. 45-47. See also the transcript of the hearing held on 24 May 2018, [No. ICC-02/04-01/15-T-178-ENG ET WT](#) where these issues were touched upon in cross examination.

<sup>19</sup> See the Programming guiding principles of the TFV and in particular to principles 5 (Ensure capacity building to strengthen quality and sustainability) and 7 (Facilitate action learning through participatory approach). The Principles are available at the following address: <https://trustfundforvictims.org/en/what-we-do/programming-guiding-principles>.

<sup>20</sup> See the Notification, *supra* note 4, para. 14.

<sup>21</sup> *Idem*, paras. 4 to 13.

have been conducted prior to the issuance of the Board's decision,<sup>22</sup> explaining the reasons for its lateness and justifying the current gap during which the victims are left without any assistance projects or activities.

19. Counsel note the TFV's statement that "*the newly selected projects and corresponding specified activities represent a continuation of the specified activities contained in the 2008 Notification*"<sup>23</sup>; as well as the recognition of "*the necessity to provide physical and psychological rehabilitation and material support*" to victims and their families.<sup>24</sup> However, projects referring to material support, and in particular to micro-credit initiatives as previously contained in the 2008 Notification, are not included in the Notification.<sup>25</sup> In these circumstances, Counsel can only assume that such non-inclusion is the result of a previous assessment undertaken by the TFV, which – although not mentioned in the Notification – indicates that victims and their families do not face corresponding needs anymore. Should this not be the case, the Notification and its Annex would be inconsistent in terms of information provided and lacking important and necessary explanations.

20. Counsel also note the lack of details provided in the Annex to the Notification. For instance, the Annex contains the goals set for the specified activities without detailing the concrete objectives set in order to reach said goals, *i.e.* the specific and concrete elements (clear, measurable and focused) that need to be met in order to implement said established goals. These elements remain necessary to ensure that the assistance program makes the concrete impacts at which it aims, for the greater benefit of the victims and their families, and more generally of the affected communities. The same holds true with the absence of any reference to the

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<sup>22</sup> See the Programming guiding principles of the TFV, *supra* note 19, and in particular principles 4 (Develop and implement communications and outreach initiatives), 6 (Work with implementing partners to assess, mitigate and evaluate the likely environmental impact of a proposed project or programme), 7 (Facilitate action learning through participatory approach).

<sup>23</sup> See the Notification, *supra* note 4, para. 14 (emphasis added).

<sup>24</sup> *Idem*, p. 6 (emphasis added).

<sup>25</sup> See the Confidential Annex to the 2008 Notification, *supra* note 16, pp. 2 (project No. TFV/UG/2007/R1/006) and 5 (project No. TFV/UG/2007/R1/025).

integration of specific aspects related to the Acholi culture in the psychological and psychosocial projects proposed.<sup>26</sup> However, being cognizant of the TFV's experience in implementing its assistance mandate and of its gained expertise of Northern Uganda, Counsel assume that the TFV has already set all necessary elements for the six projects to be implemented as soon as possible, taking duly into account the cultural specificities and the current needs of victims.

21. Finally, Counsel note that, contrary to the 2008 Notification,<sup>27</sup> the Notification contains no assessment or comment with regard to the security and protection of victims. Although it appears that the security situation in Northern Uganda has improved, good practices for the protection of individuals benefiting from the projects to be implemented should nonetheless always be put in place.

**FOR THE FOREGOING REASONS**, Counsel respectfully request the Pre-Trial Chamber to promptly approve the proposed activities as contained in the Annex to the Notification of the Trust Fund for Victims.



**Paolina Massidda**



**Sarah Pellet**

Dated this 25<sup>th</sup> day of January 2019

At The Hague, The Netherlands

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<sup>26</sup> See *supra* note 18.

<sup>27</sup> See the 2008 Notification, *supra* note 16, paras. 37, 40, 53, 55 and 57.